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IN THE COURT OF APPEALS OF MARYLAND

**OCTOBER TERM, 1949**

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# No. 1

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WILLIAM F. HOPKINS,

*Appellant,*

*vs.*

STATE OF MARYLAND

*Appellee*

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## JURISDICTIONAL STATEMENT

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*To the Honorable, the Chief Judge of Said Court:*

The Petitioner—William F. Hopkins—in pursuance of amended Rule 12 and Rules 9 and 36 of the Revised Rules of the Supreme Court of the United States—presents to your Honor his following Jurisdictional Statement—together with his accompanying (1) Petition for the allowance of an appeal to the Supreme Court of the United States from the final Judgment of the Court of Appeals of Maryland in the above-entitled case, filed on January 11th, 1950, and his (2) Assignment of Errors.

### A. Federal Statutes Sustaining Supreme Court Jurisdiction

The jurisdiction of the Supreme Court of the United States on appeal is invoked in this *Hopkins* case by virtue

of Sections 1257 and 1257(2) of Title 28, U. S. Code (as amended through June 15th, 1949), reading as follows:

> Section 1257—"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:"
>
> • • • • • • •
>
> Section 1257(2)—"By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

### B. State Statute Involved in Constitutional Questions

In the above-entitled Hopkins case there is drawn in question the validity of a Maryland state-wide penal statute, enacted in 1943, and codified as Section 444A of Article 27, of the Annotated Code of Maryland, 1947 Cumulative Supplement, and the decision of the Court of Appeals of Maryland (highest Appellate court of the State) is in favor of its validity.

By its final opinion (January 11th, 1950) in this *Hopkins* case—the Court of Appeals of Maryland decided that Reverend Hopkins' rights under the First and Fourteenth Amendments to the Constitution of the United States were not violated by the indictment against him, based on said statute (Section 444A), which indictment was restricted by the State's "Bill of Particulars" to the small "Rev." sign at his residence and a small "Notary Public—Information" sign apart from his residence• (Appendix pp. 1-3); nor by the exclusion of Reverend Hopkins' proffer

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• (CLERK'S NOTE.—References to "Appendix" indicate references to the Appendix to Appellant's Brief filed in Maryland Court of Appeals—see page 38 of Record.)

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of State's Attorney Constable's testimony (Appendix pp. 26-27) described in the said accompanying assignment of errors, which shows in substance that Reverend Hopkins continued to use the said signs on the advice of said State's Attorney and his own reputable counsel; nor by the prejudicial testimony of Reverend Gibson relating to the Cecil County Ministerial Association mentioned in the said assignment of errors, which described the functions of the Association and Reverend Hopkins non-membership therein (Appendix pp. 4-8); nor by the Court's instruction to the jury (permissible under a unique provision of the Maryland Constitution—see *Slansky* v. *State*, 63 A. 2d 599) —which told the Jury that—". . . in every criminal case in this State, the jury is the judge of the law as well as of the fact . . . answer for yourself the interrogatory, are these signs maintained and intended to aid in the solicitation and performance of marriages . . . which you must answer from the evidence . . . and from your interpretation of the law because, after all, you have the right to interpret the law, and your verdict and judgment on the interpretation of the law is final and binding." (Appendix pp. 28-29)

The said penal statute (Section 444A) is quoted verbatim on pages 1 and 2 of the accompanying assignment of errors.

In substance—that statute prohibits the construction, erection or maintenance of "signs," etc.—"which is intended to aid in the solicitation or performance of marriages."

That statute imposes a maximum fine of $100.00 "for the first offense" and a maximum fine of $500.00 or "imprisonment" of not more than one year, or "both," for subsequent offenses.

### C. Date of Judgment Sought to Be Reviewed

On January 11th, 1950—the Court of Appeals of Maryland filed its final opinion and judgment in the above-entitled *Hopkins* case; which the Petitioner (Hopkins) desires to be reviewed and reversed by the Supreme Court of the United States.

### D. Date of Presentation of Petition for Appeal

On March 1st, 1950, William F. Hopkins presented to the Chief Judge of the Court of Appeals of Maryland his aforesaid petition for leave to appeal to the Supreme Court of the United States from the said final judgment of the Court of Appeals of Maryland, filed on January 11th, 1950.

### E. 2 Opinions of the Court of Appeals in This Case

On November 9th, 1949—the Court of Appeals of Maryland filed an opinion in the above-entitled *Hopkins* case —which "reversed" the "judgment" of the Circuit Court for Cecil County, because the Secretary-Treasurer of the Cecil County Ministerial Society testified—"that 32 Protestant Ministers were members of this association, but that defendant (Reverend Hopkins) was not a member of it," etc. (Appendix pp. 4-8.)

And that opinion added—"Defendant may have been guided by sectarian reasons or personal reasons, or both, for not joining this particular association. * * * We consider the testimony on this subject prejudicial, and therefore we must reverse the judgment of conviction."

The said opinion of November 9th, 1949, is reported in the advance sheets to 69 A. 2d 456. A copy of this opinion is attached hereto and marked—"Appendix A."

On January 11th, 1950—following a reargument of this *Hopkins* case on the technical question of whether Reverend

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Hopkins' then Attorney, Edward D. E. Rollins, had not extended his rejected objections "on this subject" (Appendix pp. 4-8) to the then obvious conclusion that Reverend Hopkins was not a member of said Ministerial Association—the Court of Appeals of Maryland "affirmed" the "judgment" of the Circuit Court for Cecil County in the above-entitled case.

The said opinion of January 11th, 1950, is not reported in any form. But a copy thereof is attached hereto and marked—"Appendix B."

Both of the aforesaid opinions read alike in respect to the aforesaid federal constitutional questions.

### F. Stages and Nature of Case

Note: the only printed appendix in this *Hopkins* case on appeal is attached to Reverend Hopkins' brief. The State did not print a supplemental appendix. Under the rules of the Court of Appeals of Maryland the transcript of the record consists of one typewritten copy; and the Court is guided by the appendix.

On September 16th, 1947—the petitioner (Reverend William F. Hopkins) was indicted by the Grand Jury of Cecil County, Maryland, on the charge that, on or about September 1st, 1947, he "• • • did unlawfully erect and maintain billboards and other structures, signs, posters and display advertising, either as separate structures or otherwise, and information booths, intended to aid in the solicitation and performance of marriages." (Appendix p. 29.)

On September 18th, 1947—the petitioner orally entered a "Demurrer short" to the said indictment; which amounts to a general demurrer. The Court "overruled" the said demurrer. (Appendix p. 30.)

The State thereafter filed a "Bill of Particulars"—which restricted the said indictment to the moderate legal sign

at the entrance to his Elkton residence, reading—"Rev. W. F. Hopkins"; and to the moderate legal sign apart from his ministerial residence, reading—"W. F. Hopkins, Notary Public, Information." (Appendix pp. 2-3, 30.)

He was tried before Court and Jury in the Circuit Court for Cecil County, and was convicted on June 30th, 1948. He filed a motion for a new trial, which was overruled. (Appendix p. 30.)

"The action of a trial court in granting or refusing a motion for a new trial is not appealable in this State." *O'Donnell* v. *State,* 188 Md. 693, 699.

On December 17th, 1948—"Judgment and sentence" ($50.00) "fine" and "costs of suit" were entered against him by the Circuit Court for Cecil County. (Appendix p. 30.)

On December 24th, 1948, he filed his appeal from said judgment to the Court of Appeals of Maryland, without paying the fine. His personal $500.00 bond was accepted by the trial court. (Appendix p. 30.)

### State's Proof

Except for the fact that every minister's sign, bearing the word Reverend or "Rev." (as applies to Reverend Hopkins' aforesaid residence sign) implies an invitation to anyone who wishes to marry by a religious ceremony —as is required in Maryland—the State offered no proof whatsoever of "solicitation" of marriages by the signs in evidence or otherwise.

Besides the photographs of the aforesaid small legal signs (Appendix p. 3) and the aforesaid prejudicial testimony of the Secretary-Treasurer, Reverend Gibson, of the dominant Cecil County Protestant Ministerial Association regarding Reverend Hopkins' non-membership therein (Appendix pp. 4-8)—the State merely proved that in the

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month of August, 1947, 1267 marriages were performed in Cecil County; that Reverend Hopkins, who long resides near the Court House, where the marriage licenses are issued, performed 286 of the said 1267 marriages in that vacation month; that only 28 Cecil County couples were included in the said 1267 marriages; that Reverend Hopkins married 3 of those 28 couples; and that 30 Ministers figured in the performance of the said 1267 marriages in the month of August, 1947. (Appendix p. 4.)

Reverend Gibson did not claim that the members of that Ministerial Association refrain from marrying the numerous non-resident couples who come to Elkton to marry because of Maryland's liberal marriage laws. (Appendix pp. 4-8.)

Moreover, the 1949 Legislature raised the marriage license fee from $2 to $4 to give the increase to Cecil County for general use. (Act of 1949, Codified as Section 12 of Article 62 of the Maryland Code.)

### Defendant's (Hopkins') Proof

In substance—Reverend Hopkins introduced the following proof and rejected proffer of proof in the trial Court: (Appendix pp. 8-27)

On behalf of the petitioner (Reverend Hopkins)—four trustees and/or members (Appendix 16-25) of the First Home Missionary Church of Middletown (affiliated with the Home Missionary Society) corroborated, in substance, the following testimony of John M. Shahan—a 5th trustee and witness of said Church (Appendix pp. 8-16):

"Direct by Mr. Rollins:

"Q. Where do you live, Mr. Shahan? A. Bear, Delaware.

Q. What is your occupation? A. Farmer.

Q. Do you know the Reverend William F. Hopkins? A. Yes, sir, I do.

Q. How long have you known him? A. For twelve years, in or about. * * * I think the first time I met him in Camden; I think that was previous to these twelve years, before that, and after that he was invited to Middletown to preach for us and after that time he became our Pastor.

Q. And how long has he been Pastor over there? A. Well, he's been pastoring around ten or twelve years.

* * * * * * *

Q. How's your attendance? A. Sometimes it is good and sometimes not so good. We have had as high as three hundred there.

Q. You first started off with an ordinary little Mission, is that right? A. Yes, in the old academy building.

Q. About two years ago, what did you do? A. Reverend Hopkins asked us if we would like to have a Church and, of course, we all said yes, and he started out and he didn't stop until he completed a Church for us, and we have it now.

Q. I show you a picture and ask you what that picture represents? A. That represents our Church. (Defendant's Exhibit No. 1.)

* * * * * * *

Q. Are you a member of the Board of the Trustees of the Church? A. Yes, sir.

Q. What's the largest attendance you had at any service? A. Around three hundred is the largest we have ever had.

Q. How often does he conduct services at the Church? A. At Middletown twice a week.

Q. When are they? A. Sundays and Wednesday evenings.

Q. And, in addition to conducting those services, what other work does he do in connection with the

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membership? A. He meets once a week over in Hollingsworth Manor. That is at the homes and families that live at Hollingsworth Manor and I guess he's pastored other places when he's called to preach a service to some other Church. I have been with him myself on several occasions.

Q. Now what particular religious group is your Church affiliated with? A. Why, it's the Home Missionary Society.

Q. Now in the performance of his duties as Pastor, does he visit the membership, the sick and the afflicted, etc.? A. He does. I believe the man, if he was,—or he has done it when he was under the doctor's care, he has went out and visited the sick.

• • • • • • •

Cross by Mr. Scarborough:

Q. Have you visited him over here? A. I have.

Q. At which address? A. 148 East Main Street.

Q. You have noticed the sign there that he has? A. I have.

Q. Have you seen it at night? A. No. I haven't been in here at night.

Q. When you did see it, was the light burning in daytime? A. Not to the best of my knowledge, no.

Q. You are familiar with the sign out here near the dual highway, are you not? A. I can't say that I am.

Q. Which way do you come in Elkton? A. We came in Route 40 over to the light. I have come in both ways at various times.

Q. You mean to say you have never seen that sign? A. I wouldn't say I had never seen it."

• • • • • • •

The Court may take judicial notice of the fact that Reverend Hopkins' church is in the adjoining county and that his Mission in Hollingsworth Manor is in Cecil County.

As is further shown under "Question Presented No. II" in the accompanying Assignment of Errors—Rever-

end Hopkins sought to prove that he continued to use the 2 small legal signs in evidence with the advice of his then reputable attorneys (Rollins and Bratton) and the chief prosecutor in this case—State's Attorney Constable for Cecil County—who expressed to him the opinion that said signs did not violate the aforementioned vague Section 444A of Article 27 of the Annotated Code of Maryland. (This advice was given to the appellant after the Court of Appeals reversed the lower Court's ruling which held said Section to be constitutional in *State of Maryland* v. *Anna L. Clay*, 182 Md. 639, 35 A. 2d 821.) (Appendix pp. 26-27.)

The following authorities show that the advice of counsel is relevant to a charge involving an unlawful intent—as applies to the said statute (Section 444A):

36 Corpus Juris, page 766 (section 108); *Long* v. *State of Delaware*, Del. Supreme Court, March 31, 1949, Digested in 17 U. S. Law Week 2458, April 5, 1949, and on page 500 of the American Bar Association Journal of June, 1949, Vol. 35.

In any event, Reverend Hopkins' continued use of said signs upon the advice of State's Attorney Constable—may be considered in relation to the federal constitutional questions in this case, especially since State's Attorney Constable was later the chief prosecutor of Reverend Hopkins in this case, due to the use of those signs.

*Stromberg* v. *California*, 283 U. S. 359, 361, 364; *Terminiello* v. *Chicago*, 337 U. S. 1, 5; *Saia* v. *New York*, 334 U. S. 558, 562; *Tucker* v. *Texas*, 326 U. S. 517.

"Exceptions" to rulings on evidence was abolished by rule 17 of the Rules of the Court of Appeals of Maryland applicable to Appeals, prior to the trial of this *Hopkins* case.

Reverend Hopkins actually excepted to the action of the lower Court in overruling his general demurrer to the in-

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dictment (Appendix pp. 30)—although the exception was unnecessary under said Rule 17.

### G. Grounds for Contending That the Constitutional Questions Are Substantial

A—The following decisions of the Supreme Court of the United States seemingly support Reverend Hopkins' contention that he, as the active pastor for about 12 years of the fine First Home Missionary Church, which he, mainly, caused to be built, was deprived of the "free exercise" of his constitutional rights, as such minister of religion, as guaranteed by the above-mentioned First Amendment to the Constitution of the United States (made applicable to the States by the Fourteenth Amendment to said Constitution), by his indictment, trial and sentence for the alleged violation of the vague Section 444A of Article 27 of the Annotated Code of Maryland, and also by permitting the jury to determine, both as a matter of law and fact, whether the pictured signs in evidence were "unlawfully" erected and maintained and "intended to aid in the solicitation or performance of marriage," especially since any sign bearing Reverend or "Rev."—as appellant's residence sign reads—is obviously an invitation to any one desiring a minister for the purpose of marriage. (Appendix 3.)

In *Saia* v. *New York*, 334 U. S. 558, 92 L. Ed. 1087, Justice Douglas, speaking for the majority of the Court, declared in part as follows (quoting from pages 559 to 560 of 334 U. S.):

> "Appellant is a minister of the religious sect known as Jehovah's Witnesses. He obtained from the Chief of Police permission to use sound equipment, mounted atop his car, to amplify lectures on religious subjects. The lectures were given at a fixed place in a public park on designated Sundays. When this permit ex-

pired, he applied for another one but was refused on the ground that complaints had been made. Appellant nevertheless used his equipment as planned on four occasions, but without a permit. He was tried in Police Court for violations of the ordinance. It was undisputed that he used his equipment to amplify speeches in the park and that they were on religious subjects. Some witnesses testified that they were annoyed by the sound, though not by the content of the addresses; others were not disturbed by either. The court upheld the ordinance against the contention that it violated appellant's rights of freedom of speech, assembly, and worship under the Federal Constitution. Fines and jail sentences were imposed. His convictions were affirmed without opinion by the County Court for Niagara County and by the New York Court of Appeals, 297 N. Y. 659, 76 N. E. 2d 323. The case is here on appeal.

"We hold that Section 3 of this ordinance is unconstitutional on its face, for it establishes a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted. The ordinance therefore has all the vices of the ones which we struck down in Cantwell *v.* Connecticut, 310 U. S. 296; Lovell *v.* Griffin, 303 U. S. 444; and Hague *v.* C.I.O., 307 U. S. 496."

This majority opinion of Justice Douglas ends (on page 562 of 334 U. S.) with the following warning to the Courts of the nation:

"Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that proc-

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ess they should be mindful to keep the freedoms of the First Amendment in a *preffered position.* See March *v.* Alabama, 326 U. S. 501, 509." (Italics supplied. )

In *Tucker* v. *Texas,* 326 U. S. 517, 66 S. Ct. 274, 90 L. Ed. 274, the Supreme Court held that the Constitutional guaranty of freedom of religions precludes the application to a minister of the sect known as Jehovah's Witnesses, who undertook, contrary to the order of the manager of a village constructed to house workers in national defense activities on lands of the United States, to call at the doors of residents thereof, presenting his religious views to those willing to listen and distributing religious literature to those willing to receive it, in violation of a State statute making it an offense wilfully to refuse to leave premises after having been notified to do so by the owner or possessor thereof.

The syllabus to the recent case of *Terminiello* v. *Chicago,* 337 U. S. 1-2, digests the facts and law of the case as follows:

> "In a meeting which attracted considerable public attention, petitioner addressed a large audience in an auditorium outside of which was an angry and turbulent crowd protesting against the meeting. He condemned the conduct of the crowd outside and vigorously criticized various political and racial groups. Notwithstanding efforts of a cordon of police to maintain order, there were several disturbances in the crowd. Petitioner was charged with violation of an ordinance forbidding any 'breach of the peace,' and the trial court instructed the jury that any misbehavior which 'stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance' violates the ordinance. Petitioner did not except to that instruction, but he did maintain at all times that, as applied to his conduct, the ordinance violated his right of free speech under the Federal Constitution. He was convicted on a general verdict and his conviction

was affirmed by an intermediate appellate court and by the Supreme Court of the State. Held:

"1. As construed by the trial court and applied to petitioner, the ordinance violates the right of free speech guaranteed by the First Amendment, made applicable to the States by the Fourteenth Amendment. Pp. 4-5.

"2. It is immaterial that petitioner took no exception to the instruction and that, throughout the appellate proceedings, the state courts assumed that the only conduct punishable and punished under the ordinance was conduct constituting 'fighting words,' since the verdict was a general one and it cannot be said that petitioner's conviction was not based upon the instruction quoted above. Stromberg *v.* California, 283 U. S. 359. Pp. 5-6. 400 Ill. 23, 70 N. E. 2d 39, reversed."

Paragraphs 4 and 5 of the syllabus to *Stromberg* v. *California*, 283 U. S. 359, read as follows:

"4. A state statute penalizing the public display of a flag, banner, or device, 'as a sign, symbol or emblem of opposition to organized government,' being capable of construction as embracing conduct which the state may not constitutionally prohibit, is invalid as infringing upon the constitutional right of free speech, and accordingly repugnant to the guaranty of liberty contained in the 14th Amendment.
"Appeal, s. 1600—reversible error—instruction permitting conviction if any part of statute violated—statute not wholly constitutional.

"5. A conviction must be set aside where the verdict of guilty did not specify the ground upon which it rested and the jury were instructed that their verdict might be given with respect to any one of the three clauses of the statute the violation of which was charged, and one of such clauses is unconstitutional."

In that *Stromberg* case—Chief Justice Hughes, speaking for the majority of the Court, also emphasized that, al-

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though Stromberg—"before the district court of appeal, accepted this instruction as correct"—he could claim in the Supreme Court of the United States that the instruction is repugnant to his rights under the Constitution of the United States.

The brief of the Attorney General of Maryland on appeal in this *Hopkins* case concedes that *State* v. *Clay*, 182 Md. 639, did not consider the First Amendment to the Constitution of the United States in adjudging the aforesaid Section 444A of Article 27 of the Annotated Code of Maryland, 1947 Cumulative Supplement, to be constitutional. Mrs. Clay is a laywoman.

Furthermore—in view of Reverend Hopkins' overruled general demurrer to the indictment in the lower court and "Question Presented No. I" in his Brief on Appeal in this case—the Court of Appeals (in both of the aforementioned Opinions in this *Hopkins* case) ruled that the said statute (Section 444A), as invoked against Reverend Hopkins in the lower Court, did not violate the First or the Fourteenth Amendment to the Constitution of the United States.

The said "Question Presented No. I" reads as follows:

> "Should the Court have excluded, over Appellant's objections, the questions to State's Attorney Henry L. Constable, and the Appellant's proffers, to show that after the decision of the Court of Appeals in the case of State of Maryland *v.* Anna L. Clay, which reversed the lower Court and upheld the Constitutionality of Section 444A of Article 27 of the Annotated Code of Maryland—Attorneys William J. Bratton and Edward D. E. Rollins visited the Office of State's Attorney Constable regarding the legality of the signs represented by the pictures offered in evidence in this Hopkins case and it was then agreed between these lawyers that, in their opinion, said signs did not constitute a violation of that Section, and that, if at any

future time their opinions should change, notice thereof would be given? (Ap. 26-27).
"Note:—The *Clay* case is reported in 182 Md. 639."

Finally, it may be observed that the said November 9th, 1949, and January 11th, 1950, opinions of the Court of Appeals in this *Hopkins* case impliedly overruled the following interpretation of the said act (Section 444A) in *State* v. *Clay*, 182 Md. 639, 645-646:

> "It was argued that the board usually attached to churches, containing the name of the church, days and hours of service, and the name and address of the minister, might be interpreted as an advertisement and violation of this Act. That is rather far-fetched. If the church or minister, however, would decorate his church with a sign advertising for and soliciting marriages or marriage licenses, it would be a violation of the Act and would subject the offender to punishment."

Both of the aforesaid opinions in the *Hopkins'* case quote from the recent and leading case of *Slansky* v. *State* (*Md.*), 63 A. 2d 599, upon the highly unique provision of the Maryland Constitution which provides that in the trial of criminal cases the jury shall be the judges of law as well as of fact. But the following language of the *Slansky* case (page 606) is not quoted in the said opinions of the *Hopkins* case:

> "In Maryland, where the jury are judges of both law and fact, the Court of Appeals does not pass upon the comparative weight of conflicting evidence or upon the sufficiency of evidence to establish the crime charged. Our review of a criminal case is limited to errors of law committed by the trial court in its rulings. Where there is no reversible error in the rulings of the trial court, the verdict cannot be reversed. Wilson *v.* State, 181 Md. 1, 26 A 2d 770; Bright *v.* State, 183 Md. 308, 318, 38 A. 2d 96; Jones *v.* State, Md., 52 A. 2d

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484; Davis *v.* State, Md., 55 A. 2d 702; Hill *v.* State, Md., 59 A. 2d 630."

However, since the writing of the opinion in the *Slansky* case in 1949, the Court of Appeals of Maryland progressively adopted "Criminal Rules of Practice and Procedure," effective January 1st, 1950, Rule 6 of which provides that "the accused may request an instruction that the evidence is insufficient in law to justify his conviction"; and that "the Court of Appeals of its own motion may take cognizance of and correct any plain error material to the rights of the accused even though not included in the assignment of errors."

**Conclusion**

For the reasons stated above and because, if the aforesaid final judgment and decision in this case is not reversed, the said Reverend William F. Hopkins, in effect, will unlawfully be deprived of his Constitutional freedom of religion, liberty, property and the use of a "Rev." sign that merely shows him to be a Minister of Religion—we respectfully submit that his accompanying Petition for the allowance of an appeal from the Court of Appeals of Maryland to the Supreme Court of the United States should be granted.

Respectfully submitted,

LOUIS S. ASHMAN,
*Counsel for Appellant.*

## APPENDIX "A"

COURT OF APPEALS OF MARYLAND

October Term, 1949

No. 1

Filed November 9, 1949

William F. Hopkins,

vs.

State of Maryland

Appeal from the Circuit Court for Cecil County, (continued from No. 155, October Term, 1948). Floyd J. Kintner, Judge.

Argued by *Louis S. Ashman*, Baltimore, Md., (*Edward D. E. Rollins*, Elkton, Md., on the brief) for appellant.

Argued by *Harrison L. Winter*, Assistant Attorney-General, and *Kenneth C. Proctor*, Assistant Attorney-General, both of Baltimore, Md., (*Hall Hammond*, Attorney-General, Baltimore, Md., and *Henry L. Constable*, State's Attorney of Cecil Co., and *Gifford Scarborough*, Assistant State's Attorney of Cecil Co., both of Elkton, Md., on the brief), for appellee.

Argued before Marbury, Ch. J.; Delaplaine, Collins, Grason, Henderson and Markell, JJ.

Judgment reversed.

Delaplaine, *J.:*

This appeal was taken by the Rev. William F. Hopkins, of Elkton, from the judgment of conviction entered upon the verdict of a jury in the Circuit Court for Cecil County for violation of the statute making it unlawful to erect or maintain any sign intended to aid in the solicitation or performance of marriages. Laws of 1943, ch. 532, Code Supp. 1947, art. 27, sec. 444A.

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The State charged that on September 1, 1947, defendant maintained a sign at the entrance to his home at 148 East Main Street in Elkton, and also a sign along a highway leading into the town, to aid in the solicitation and performance of marriages. Four photographs were admitted in evidence. One photograph, taken on an afternoon in September, 1947, shows the sign in Elkton containing the name "Rev. W. F. Hopkins." Another, taken at night shows the same sign illuminated at night by electricity. The third shows the other sign along the highway containing the words, "W. F. Hopkins, Notary Public, Information." The fourth shows this sign illuminated at night.

The State showed that during the month of August, 1947, thirty ministers performed 1,267 marriages in Cecil County, and of this number defendant performed 286, only three of which were ceremonies in which the parties were residents of Cecil County.

Defendant did not testify. Several witnesses, however, testified that, though he has been residing in Elkton, he has been serving as the pastor of a church with about 40 members in Middletown, Delaware, known as the First Home Missionary Church.

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After the passage of these restrictive Acts, there were still signs in Elkton and along the highway offering information to couples contemplating matrimony. Accordingly in 1943 the Legislature passed the Act, which is now before us, to prohibit billboards, signs, posters or display advertising of any kind, or information booths, intended to and in the solicitation or performance of marriages. In 1944 this Court in State vs. Clay, 182 Md. 639, 35 A. 2d 821, held that the Act was a proper exercise of legislative power.

Defendant, however, contended that the Court of Appeals considered only the question whether the Act violated the Fourteenth Amendment of the Federal Constitution, and did not specifically decide whether the Act violated the First Amendment. It is established that freedom of religion, secured by the First Amendment against abridgment by the United States, is also secured to all persons by the Fourteenth Amendment against abridgment by a State. The due process clause has rendered the Legislatures of the States as incompetent as Congress to enact any laws respecting an establishment of religion, or prohibiting the free exercise thereof. Gitlow vs. New York, 268 U. S. 652, 45 S. Ct. 625, 630, 69 L. Ed. 1138; Near vs. Minnesota, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357; Schneider vs. New Jersey, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Cantwell vs. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352; Baltimore Radio Show vs. State, Md., 67 A. 2d 497, 507. But the first Amendment embraces two concepts, freedom to believe and freedom to act. On one hand, it prevents compulsion

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by law of the acceptance of any creed or the practice of any form of worship. On the other hand, it safeguards the free exercise of the chosen form of religion. Freedom to believe is absolute, but freedom to act is not. Conduct is subject to regulation for the protection of society. While the power to regulate must be so exercised in every case as not to infringe the protected freedom, the State, by general and non-discriminatory legislation, may safeguard the peace, good order and comfort of the community without unconstitutionally invading the liberties protected by the Fourteenth Amendment. It is well known that marriage, while from its very nature a sacred obligation, is nevertheless a civil contract and is regulated by law. Reynolds vs. United States, 98 U. S. 145, 25 L. Ed. 244, 250. And, as we said in State vs. Clay, 182 Md. 639, 643, 35 A. 2d 821, the unethical practice adopted by some ministers of erecting large signs near the courthouse and along the highways to aid in the solicitation of marriages was not compatible with the ministerial calling and not practiced by any respectable minister. It has been held that prohibition of polygamy is not unconstitutional as against those who profess a religious belief in polygamy. Reynolds vs. United States, 98 U. S. 145, 25 L. Ed. 244; Cleveland vs. United States 329 U. S. 14, 91 L. Ed. 12. Whether defendant or someone else shall perform a marriage is not a religious question at all, except to those whose religion does not permit them to be married by defendant. The Act is constitutional.

It was insisted by defendant that the jury deprived him of the right to the free exercise of religion by a manifestly improper and unfair verdict. He argued that there was no reason to believe that any marriage was solicited by the sign at the entrance to his home merely because the title "Rev." appeared on the sign. He argued that the jury cannot constitutionally take from him, as the pastor of a church, the right to put his name at the entrance to his home. He maintained that the fact that he had performed a large proportion of the marriages in Elkton was no proof of solicitation, especially since his home is near the courthouse. He urged that it was perfectly clear that the jury had misapplied the statute by deciding that

a sign of moderate size containing only his name and the title "Rev." was intended to aid in the solicitation of marriages.

We have held in Slansky vs. State, Md., 63 A. 2d 599, that Article 15, Section 5, of the Constitution of Maryland, providing that in the trial of all criminal cases the jury shall be the judges of law, as well as of fact, does not conflict with the due process clause of the Fourteenth Amendment of the Constitution of the United States. The provision of our State Constitution has been interpreted so as to give to the accused every reasonable consideration possible without trespassing upon the rules of constitutional construction. The judge in a criminal trial has the right to instruct the jury as to the legal effect of the evidence admitted at the trial. If such an instruction is erroneous, an appeal may be taken to the Court of Appeals. In the case at bar the judge did instruct the jury and he treated the Act as constitutional. The Act is constitutional and the judge was right in so holding. We find no error in the Judge's instruction. Moreover, defendant, after the jury rendered their verdict of guilty, filed a motion for a new trial. He was then given an opportunity to be heard upon any contentions as to abridgment of his constitutional rights. But the trial judge overruled his motion. We find no basis for the contention that the judgment in this case abridges defendant's constitutional rights.

*Second.* Defendant contended that the judge erred in excluding testimony offered to show that the State's Attorney advised him in 1944, before he erected the signs, that they would not violate the law. It is generally held that the advice of counsel, even though followed in good faith, furnishes no excuse to a person for violating the law and cannot be relied upon as a defense in a criminal action. Forwood vs. State, 49 Md. 531, 538; Miller vs. United States, 4 Cir., 277 F. 721. Moreover, advice given by a public official, even a State's Attorney, that a contemplated act is not criminal will not excuse an offender if, as a matter of law, the act performed did amount to a violation of the law. State vs. Foster, 22 R. I. 163, 46 A. 833; Staley vs. State, 89 Neb. 701, 131 N. W. 1028, 34

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L. R. A., N. S., 613; State vs. Whiteaker, 118 Or. 656, 247 P. 1077. These rules are founded upon the maxim that ignorance of the law will not excuse its violation. If an accused could be exempted from punishment for crime by reason of the advice of counsel, such advice would become paramount to the law.

While ignorance of fact may sometimes be admitted as evidence of lack of criminal intent, ignorance of the law ordinarily does not give immunity from punishment for crime, for every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. In the case at bar defendant did not claim that the State's Attorney misled him regarding any facts of the case, but only that the State's Attorney advised him as to the law based upon the facts. Defendant was aware of the penal statute enacted by the Legislature. He knew what he wanted to do, and he did the thing he intended to do. He claims merely that he was given advice regarding his legal rights. If there was any mistake, it was a mistake of law and not of fact. If the right of a person to erect a sign of a certain type and size depends upon the construction and application of a penal statute, and the right is somewhat doubtful, he erects the sign at his peril. In other words, a person who commits an act which the law declares to be criminal cannot be excused from punishment upon the theory that he misconstrued or misapplied the law. Levar vs. State, 103 Ga. 42, 29 S. E. 467, 470; Lewis vs. State, 124 Tex. Cr. R. 582, 64 S. W. 2d 972, 975. For these reasons the exclusion of the testimony offered to show that defendant had sought and received advice from the State's Attorney was not prejudicial error.

*Third.* Defendant objected to the testimony of the Rev. Arthur J. Gibson, pastor of the Elkton Presbyterian Church and secretary and treasurer of the Cecil County Ministerial Association, that 32 Protestant ministers were members of this association, but that defendant was not a member of it. It is an elementary rule that evidence, in order to be admissible, must be relevant to the issues and must tend either to establish or disprove them, and evidence which does not tend to describe or explain the facts and

circumstances of the case is inadmissible. The Court should exclude collateral facts, which do not afford a reasonable presumption or inference as to the principal matter in dispute. The reason for this rule is that the admission of collateral facts would tend to draw the minds of the jurors away from the point in issue and arouse their prejudices and mislead them. It is also established that the admission of irrelevant evidence will not require reversal if it appears that the evidence was not prejudicial. Hitzelberger vs. State, 174 Md. 152, 161, 197 A. 605; Pearson vs. State, 182 Md. 1, 13, 31 A. 2d 624; Duncan vs. State, Md., 58 A. 2d 906. In the instant case the question whether defendant was a member of the association of Protestant ministers in Cecil County was irrelevant. Defendant may have been guided by sectarian reasons or personal reasons, or both, for not joining this particular association. We consider the testimony on this subject prejudicial, and therefore we must reverse the judgment of conviction.

Judgment reversed and case remanded for a new trial.

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## APPENDIX "B"

COURT OF APPEALS OF MARYLAND

OCTOBER TERM, 1949

No. 1

WILLIAM F. HOPKINS

*vs.*

STATE OF MARYLAND

(Modified Opinion)

Filed January 11, 1950

Appeal from the Circuit Court for Cecil County. (Continued from No. 155, October Term, 1948.) J. Floyd Kintner, Judge.

Re-argued by *Edward D. E. Rollins*, Elkton, Md. (*Louis S. Ashman*, Baltimore, Md., on the brief), for appellant.

Re-argued by *Harrison L. Winter*, Assistant Attorney-General, (*Hall Hammond*, Attorney-General, *Kenneth C. Proctor*, Assistant Attorney-General, all of Baltimore, Md., and *Henry L. Constable*, State's Attorney, Cecil County, and *Gifford Scarborough*, Assistant State's Attorney, Cecil County, both of Elkton, Md.), for appellee.

Re-argued before Marbury, Chief Judge; Delaplaine, Collins, Grason, Henderson and Markell, JJ.

Judgment affirmed.

DELAPLAINE, *J.*:

This appeal was taken by the Rev. William F. Hopkins, of Elkton, from the judgment of conviction entered upon the verdict of a jury in the Circuit for Cecil County for violation of the statute making it unlawful to erect or maintain any sign intended to aid in the solicitation or performance of marriages. Laws of 1943, ch. 532, Code Supp. 1947, art. 27, sec. 444A.

The State charged that on September 1, 1947, defendant maintained a sign at the entrance to his home at 148 East Main Street in Elkton, and also a sign along a highway leading into the town, to aid in the solicitation and performance of marriages. Four photographs were admitted in evidence. One photograph, taken on an afternoon in September, 1947, shows the sign in Elkton containing the name "Rev. W. F. Hopkins." Another, taken at night shows the same sign illuminated at night by electricity. The third shows the other sign along the highway containing the words, "W. F. Hopkins, Notary Public, Information." The fourth shows this sign illuminated at night.

The State showed that during the month of August, 1947, thirty ministers performed 1,267 marriages in Cecil County, and of this number defendant performed 286, only three of which were ceremonies in which the parties were residents of Cecil County.

Defendant did not testify. Several witnesses, however, testified that, though he has been residing in Elkton, he has been serving as the pastor of a church with about 40 members in Middletown, Delaware, known as the First Home Missionary Church.

*First.* Defendant contended that his conviction by the Court below deprives him of the free exercise of religion guaranteed by the First Amendment of the Federal Constitution. The Act of 1943, now under consideration, was passed by the Legislature of Maryland to curb the thriving businesses which unethical ministers had built up as a result of the tremendous increase in the number of couples coming into the State to be married following the passage of stringent marriage laws in nearby States. The first measure passed by the Legislature to suppress these unethical practices was the Act of 1922 making it unlawful for any minister to give or offer to give any money, present or reward to any hotel porter, railroad porter, or any other person as an inducement to direct to said minister any person contemplating matrimony. Laws of 1922, ch. 110, Code 1939, art. 27, sec. 444. In 1937 the Legislature directed that no marriage license shall be delivered by the Clerk of the Court until after the expiration of 48 hours from

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After the passage of these restrictive Acts, there were still signs in Elkton and along the highways offering information to couples contemplating matrimony. Accordingly in 1943 the Legislature passed the Act, which is now before us, to prohibit billboards, signs, posters or display advertising of any kind, or information booths, intended to aid in the solicitation or performance of marriages. In 1944 this Court in State vs. Clay, 182 Md. 639, 35 A. 2d 821, held that the Act was a proper exercise of legislative power.

Defendant, however, contended that the Court of Appeals considered only the question whether the Act violated the Fourteenth Amendment of the Federal Constitution, and did not specifically decide whether the Act violated the First Amendment. It is established that freedom of religion, secured by the First Amendment against abridgment by the United States, is also secured to all persons by the Fourteenth Amendment against abridgment by a State. The due process clause has rendered the Legislatures of the States as incompetent as Congress to enact any laws respecting an establishment of religion, or prohibiting the free exercise thereof. Gitlow vs. New York, 268 U. S. 652, 45 S. Ct. 625, 630, 69 L. Ed. 1138; Near vs. Minnesota, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357; Schneider vs. New Jersey, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Cantwell vs. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352; Baltimore Radio Show vs. State, Md., 67 A. 2d 497, 507. But the First Amendment embraces two concepts, freedoms to believe and freedom to act. On one hand, it prevents compulsion by law of the acceptance of

any creed or the practice of any form of worship. On the other hand, it safeguards the free exercise of the chosen form of religion. Freedom to believe is absolute, but freedom to act is not. Conduct is subject to regulation for the protection of society. While the power to regulate must be so exercised in every case as not to infringe the protected freedom, the State, by general and non-discriminatory legislation, may safeguard the peace, good order and comfort of the community without unconstitutionally invading the liberties protected by the Fourteenth Amendment. It is well known that marriage, while from its very nature a sacred obligation, is nevertheless a civil contract and is regulated by law. Reynolds vs. United States, 98 U. S. 145, 25 L. Ed. 244, 250. And, as we said in State vs. Clay, 182 Md. 639, 643, 35 A. 2d 821, the unethical practice adopted by some ministers of erecting large signs near the courthouse and along the highways to aid in the solicitation of marriages was not compatible with the ministerial calling and not practiced by any respectable minister. It has been held that prohibition of polygamy is not unconstitutional as against those who profess a religious belief in polygamy. Reynolds vs. United States, 98 U. S. 145, 25 L. Ed. 244; Cleveland vs. United States, 329 U. S. 14, 91 L. Ed. 12. Whether defendant or someone else shall perform a marriage is not a religious question at all, except to those whose religion does not permit them to be married by defendant. The Act is constitutional.

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*Third.* Defendant now complains of the testimony of the Rev. Arthur J. Gibson, pastor of the Elkton Presbyterian Church and secretary and treasurer of the Cecil County Ministerial Association, that 32 Protestant ministers were members of this association, but that defendant was not a member of it. It is an elementary rule that evidence, in

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order to be admissible, must be relevant to the issues and must tend either to establish or disprove them, and evidence which does not tend to describe or explain the facts and circumstances of the case is inadmissible. The Court should exclude collateral facts, which do not afford a reasonable presumption or inference as to the principal matter in dispute. The reason for this rule is that the admission of collateral facts would tend to draw the minds of the jurors away from the point in issue and arouse their prejudices and mislead them. It is also established that the admission of irrelevant evidence will not require reversal if it appears that the evidence was not prejudicial. Hitzelberger vs. State, 174 Md. 152, 161, 197 A. 605; Pearson vs. State, 182 Md. 1, 13, 31 A. 2d 624; Duncan vs. State, Md. 58 A. 2d 906.

Defendant objected in the Court below to the following questions: (1) Do you know if there is a Minister's Association in Cecil County? (2) Can you state who the officers of that organization are? (3) What is the purpose of that organization? (4) Is it necessary that you have a Church to belong to the organization? The objections to these questions were overruled. The witness answered that there is such an organization in Cecil County; gave the names of the officers; explained its purposes; and expressed the opinion that it is necessary to have a Church to belong to the organization.

The witness then went on to testify without objection that he believed the organization is a membership of Churches rather than a membership of individuals, since the pastors of the Churches are invited to the meetings. He also testified that 32 Churches are represented in the organization, the pastor of each Church being a member.

It was then that the witness was asked whether defendant was a member of the organization. He replied: "I have no record of his name."

All of this testimony concerning the Ministerial Association was irrelevant, but none of it was prejudicial except the final answer indicating that defendant was not a member of the organization. No objection was made in the

Court below to the final question. No motion was made to strike out this testimony, and there was no ruling by the Court. Hence, there is no basis for the claim on this appeal that the Court committed reversible error. Davis vs. State, Md. 55 A. 2d 702, 704.

Judgment affirmed, with costs.

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